STATE OF MICHIGAN

COURT OF APPEALS

PLASTIC PLATERS, INC., Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED April 11, 2006
v	No. 258061 Kent Circuit Court
MACDONALD'S INDUSTRIAL PRODUCTS, INC., Defendant/Counter-Plaintiff-Appellant.	LC No. 02-005572-CK

Before: Kelly, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant MacDonald's Industrial Products, Inc ("MIP") appeals as of right from the circuit court's judgment for plaintiff Plastic Platers, Inc ("PPI"). We affirm.

MIP makes plastic car parts. From 1998 to 2000, MIP sent its car parts to PPI and PPI applied a chrome finishing to the parts. PPI initiated this lawsuit to recover money that it claimed MIP failed to pay on its invoices. At trial, PPI claimed that its quotations contained the terms governing the parties' contract, and that pursuant to its quotations, MIP took improper deductions for short shipments, defective parts, and expedited freight charges. MIP attempted to admit into evidence Exhibit K-1, eight of its purchase orders. But after it was discovered that the purchase orders in Exhibit K-1 were not the same purchase orders in the proposed trial exhibit given to opposing counsel, the circuit court reserved ruling on the admissibility of Exhibit K-1. MIP never made another request to admit Exhibit K-1. The circuit issued judgment in favor of PPI finding that MIP failed to comply with the terms in PPI's quotations. MIP moved for a new trial, arguing that the circuit court's failure to rule on the admissibility of Exhibit K-1 required modification of the circuit court's judgment because its purchase orders contained the terms governing the parties' contract.

MIP argues the circuit court erred in denying its motion for a new trial in order to admit Exhibit K-1 because the purchase orders contained the terms governing the parties' contract. We disagree.

This Court reviews a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391

(2004). A trial court abuses its discretion "when 'an unprejudiced person' considering 'the facts upon which the trial court acted, [would] say that there was no justification or excuse for the ruling made.'" *Id.* at 761-762, quoting *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998) (opinion by Kelly, J.). The circuit court denied MIP's motion for a new trial because it believed that MIP had abandoned Exhibit K-1 and because it believed it was clear that both parties were operating under the terms of PPI's quotations.

Error requiring reversal must be predicated on the trial court's action and not on alleged error to which the appealing party contributed to by plan or negligence. *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). MIP counsel failed to assert in any pretrial filing or discovery request that the terms listed on MIP's purchase orders were the terms controlling the parties' contract, to lay an evidentiary foundation for MIP's purchase orders at trial, or to ask the circuit court either during trial or in its post-trial brief to admit the purchase orders into evidence after the circuit court reserved ruling on the exhibit's admissibility. In sum, MIP counsel, either by plan or by negligence, failed to make the terms listed in MIP's purchase orders factually relevant and abandoned any attempts to admit Exhibit K-1 into evidence. Because the error that MIP asserts necessitates a new trial was caused by its own counsel's actions, the error is not grounds for a new trial. See *id.*

MIP also argues that the circuit court erred in holding that Article 2 of the Uniform Commercial Code applied to the parties' contract because the thrust of the parties' contract was a contract for services, not goods. MIP further argues that because Article 2 does not apply, the terms of the parties' contract are determined by common law rules of offer and acceptance, and that when applied, the common law rules mandate that MIP's purchase orders contain the terms governing the parties' contract. We acknowledge MIP's Article 2 argument; however, we do not believe it necessary to resolve that issue because even when we apply common law contract rules, we do not believe the circuit court erred in holding that PPI's quotations contained the controlling terms.

"An offer is a unilateral declaration of intention, and is not a contract." *Kamalnath v Mercy Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992). A contract is not formed until the offer is accepted. *Id.* For a response to an offer to be an acceptance, the material terms of the offer cannot be altered. *Carrollton Acceptance Co v Ruggles Motor Truck Co*, 253 Mich 1, 5; 234 NW 134 (1931); 1 Corbin on Contracts (rev ed) § 3.28 p 456. In other words, if the response has different terms, but those terms do not materially change the offer, the response will be deemed an acceptance rather than a counteroffer.

MIP argues that its purchase orders contain terms materially different than those in PPI's quotations, and therefore, its purchase orders were a rejection of PPI's quotations and a counteroffer, which PPI accepted by its performance. However, to determine if the terms in MIP's purchase orders materially changed the terms listed in PPI's quotations, this Court would be required to examine the purchase orders in Exhibit K-1. But as discussed earlier, the circuit court did not admit Exhibit K-1 into evidence because MIP never renewed its request for the circuit court to admit the exhibit after the circuit court reserved its ruling on the exhibit's admissibility. And, as we have already held, the circuit court did not err in denying MIP's motion for a new trial in order to admit Exhibit K-1.

Therefore, when the circuit court needed to decide which document contained the governing terms of the contract, it had only one document containing contract terms in front of it—PPI's quotations. MIP presented no evidence for the circuit court to conclude that the terms in PPI's quotations were not the governing terms of the contract. In fact, the evidence presented establishes that MIP believed the terms contained in PPI's quotations were the terms governing the parties' contract. MIP stated in its answers to PPI's interrogatories that PPI's measure of damages was governed by the terms in PPI's quotations; MIP's president admitted that the shipping arrangement was F.O.B. PPI both ways; and MIP's quality manager testified that he had obtained MRA numbers for defective parts on numerous occasions. In addition, MIP's president testified that he was not aware if MIP's purchase orders contained any terms contradicting the terms in PPI's quotations and MIP's quality manager testified that he had never been told the terms listed on MIP's purchase orders. Because the circuit court only had one document containing contract terms, PPI's quotations, and MIP offered no evidence that it was not operating under the terms in PPI's quotations, the circuit court did not err in holding that the terms contained in PPI's were the terms governing the parties' contract.

Finally, MIP argues that the circuit court erred in finding that MIP took improper deductions for shortages, defective parts, and expedited freight charges because the circuit court erroneously relied on the terms in PPI's quotations. We disagree. Because PPI's quotations contained the terms controlling the parties' contract, the circuit court relied on the correct terms in determining if MIP's deductions were improper.

MIP also argues that even under the terms in PPI's quotations, its deductions for defective parts and expedited freight charges were proper. We disagree. This Court reviews a trial court's findings of fact for clear error. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 41; 700 NW2d 364 (2005). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004).

First, MIP argues that the circuit court erred in finding that its deductions were improper because PPI, via the instructions of its sales manager and quality manager, waived the requirements of obtaining an MRA number and returning the defective parts. We do not believe it is necessary to determine if the parties agreed to waive these requirements because MIP failed to present any evidence to establish the amount that PPI charged MIP for the defective parts MIP was told to scrap. At trial, MIP attempted to introduce into evidence the October 26, 1999 Defective Material Report, which does contain a value amount of the parts that PPI's quality manager instructed MIP's quality manager to scrap himself. However, MIP's quality manager admitted that the amount of the value of the parts was calculated after PPI's quality manager signed the report, and the circuit court never admitted the report into evidence. Accordingly, we cannot say the circuit court erred in finding that the amount MIP took in improper deductions for defective parts was the amount claimed by PPI.

Second, MIP argues that the circuit court erred in finding that MIP took improper deductions for expedited freight charges because the word "special" as it is used in the phrase "[c]harge backs for sorting, special freight, etc. . . ." clearly means additional freight due to special requests or instructions from MIP. In essence, MIP is asserting that "special" when used in the context of additional freight charges is a term of art. However, MIP presented no evidence

at trial that "special" when used in the context of additional freight charges, has the meaning MIP attempts to give it on appeal. Accordingly, we cannot say the circuit court clearly erred in finding that MIP took improper deductions for freight charges.

MIP also argues the circuit court erred in not offsetting the amount it owed to the extent the value of the racks which remain in PPI's possession has diminished since MIP and PPI ended their relationship. We disagree. PPI's quotations do not contain a term or condition requiring PPI to return MIP's property at the end of the parties' relationship. Furthermore, PPI is holding MIP's property ready to be shipped. Therefore, we cannot say the circuit court erred in finding that MIP was not entitled to an offset.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michael J. Talbot